UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

THE WACKENHUT CORPORATION[1]

Employer

and **Case 7-RC-23212**

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

and

MICHIGAN ASSOCIATION OF POLICE 911[2]

Intervenor

APPEARANCES:
John N. Raudabaugh, Attorney, of Chicago, Illinois, for the Employer.
Mark L. Heinen, of Detroit, Michigan, for the Petitioner.
M. Catherine Farrell, of Bloomfield Hills, Michigan, for the Intervenor.

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[3], the undersigned finds:

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[1] The name of the Employer appears as amended at hearing.
[2] The name of the Intervenor appears as amended at hearing.
[3] The parties filed briefs, which were carefully considered. In addition, the Petitioner submitted a Motion to Correct Transcript. No opposition to the Petitioner's motion was filed. The Motion to Correct the Transcript is hereby granted.

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Petitioner seeks to represent a unit currently represented by the Intervenor, consisting of approximately 50 full-time and regular part-time court security officers performing guard duties as defined in Section 9(b)(3) of the Act, employed by the Employer at Detroit's 36th District Court. The Employer and Intervenor maintain that the petition is untimely under the Board's contract bar doctrine. The petition was filed on July 30, 2008. The collective bargaining agreement at issue was executed mid-June 2007, and on its face is effective April 1, 2002 - June 30, 2010.[4] The Employer asserts that because the parties executed the agreement in June 2007, explicitly agreeing to be bound by its terms for the duration of the agreement, they "reactivated" the contract bar. The Intervenor adopts the Employer's argument, and further asserts that, in the alternative, the collective bargaining agreement is a one-year agreement, or a one-year agreement that has an erroneous effective date and in either instance it is a bar to the processing of the petition. I find that there is no contract bar, as the contract ran from its effective date of April 1, 2002 and thus the three-year contract bar period elapsed by the time the petition was filed.

The Employer

The Employer, a Florida corporation, is engaged in providing security services to various commercial, industrial and governmental organizations throughout the United States and the world. Through a contract with the City of Detroit, it provides security services in coordination with the Detroit Police Department at the 36th District Courthouse located in Detroit, Michigan. These services include operation of metal

[4] The collective bargaining agreement lists conflicting dates of duration, which is discussed infra.

detectors and hand-held wand screening devices, and the escorting of persons detained on criminal charges to and from holding cells and courtrooms located in the courthouse.

History of Collective Bargaining

The Employer and Intervenor have had a collective bargaining relationship since 1987 pursuant to a Certification of Representative issued November 3, 1987 in Case 7-RM-1316, and memorialized in successive collective bargaining agreements. The contract in question in the instant proceeding was executed by the parties on June 17 and 18, 2007. The cover page of this agreement indicates that its term runs from April 1, 2002 - June 30, 2010. The duration clause in the agreement, Article 27, Duration, provides that "… this Agreement becomes effective April 1, 2002 and shall continue in full force and effect until Midnight, March 31, 2010...."[5] Article 27 also provides "IN WITNESS WHEREOF [sic] the parties have caused their representatives to sign this Agreement in full acknowledgement of their intention to be bound by the Agreement." Immediately below this clause, the Employer's general manager, Brian Carter, and the Intervenor's labor relations specialist, Joel Felt, affixed their signatures and the date of execution of the document.[6]

The predecessor agreement was effective January 1, 2004 through midnight April 1, 2005. Prior to the expiration of the 2004 - 2005 collective bargaining agreement, Felt sent the Employer a notice pursuant to Article 27, forestalling automatic renewal of the contract.[7] The parties continued to operate under the terms of the 2004-2005 agreement, but no extension to the agreement was executed. A successor agreement to the parties' 2004-2005 contract was not reached until mid-June 2007, when the 2002-2010 contract at issue was executed.[8]

Felt, the only witness in this proceeding, testified that the intention of both parties was for the agreement to run from 2007 to 2010. Felt testified that the "2002" date on the cover page was a typographical error caused by the Intervenor's support staff failing to manually insert the dates for the duration terms of the contract into documents which were part of the Intervenor's database, and used as a template for the current contract. Neither the Intervenor nor the Employer spotted the asserted errors and both parties signed the agreement with the errant dates. Felt also testified to another clerical error in Article 1, in which the exact date in 2007 when the parties entered the contract was

[5] The record is silent with respect to the conflict in the effective end date between the cover page and the Duration clause.
[6] Carter signed on June 17, inadvertently in the column designated for Intervenor representatives, and Felt signed on June 18, inadvertently in the space designated for Employer representatives.
[7] The Intervenor presented no documentary evidence in support of Felt's testimony in this regard, however Felt testified that it was his normal practice to send such notices, and he believed he did with respect to this contract.
[8] The record testimony indicates that there was great uncertainty whether the Employer would continue as the vendor of auxiliary security services for the City of Detroit at the 36th District Court, and the Intervenor did not press for negotiations.

omitted. Although the terms of this 2002-2010 agreement are substantially the same as the 2004-2005 agreement, the new agreement provided for an increase in the hourly wage to $12.40 from a range of $11.50 to $11.67 in the prior agreement, retroactive to June 1, 2006, and annual incremental increases through June 2009 (Article 21, General Wage Provision). It also provided a change in the health insurance offered employees (Article 23, Insurance).

Analysis

The Employer and Intervenor contend that there is a contract bar that prevents the processing of the instant petition.

When a petition is filed for an election among a group of employees who are covered by a collective bargaining agreement, the Board must decide whether the asserted contract exists in fact and whether it conforms to certain requirements. If the Board finds that the contract does exist and the requirements are met, the contract is held a bar to an election. This is known as the contract bar doctrine. The doctrine is intended to balance the statutory policies of stabilizing labor relations and facilitating employees' exercise of free choice in the selection or change of a bargaining representative. ***Direct Press Modern Litho, Inc***., 328 NLRB 860 (1999), citing ***Appalachian Shale Products Co.***, 121 NLRB 1160 (1958). The doctrine is Board created, not imposed by the Act or judicial case law, and the Board has considerable discretion to formulate and apply its rules. ***Bob's Big Boy Family Restaurants v. NLRB***, 625 F.2d 850, 851, 853-4 (9th Cir. 1980). The burden of proving contract bar rests with the party asserting contract bar. See ***Roosevelt Memorial Park, Inc***., 187 NLRB 517, 517-518 (1970).

A contract having a fixed term of more than three years operates as a bar for as much of its term as does not exceed three years. ***General Cable Corp.***, 139 NLRB 113 (1962). When, after the end of the first three years of a long-term contract, and before the filing of a petition, the parties execute a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract or written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, the new agreement or amendment is effective as a bar for as much of its term as does not exceed three years. ***Sante Fe Transportation Co.***, 139 NLRB 1513, 1514, fn.2 (1962), citing ***Southwestern Portland Cement Co.***, 126 NLRB 931 (1960).

In a representation case in which contract bar is asserted, the Board has consistently limited its inquiry to the four corners of the document alleged to bar an election and has excluded the consideration of extrinsic evidence. ***South Mountain Healthcare and Rehabilitation Center***, 344 NLRB 375 (2005); ***Waste Management of Maryland, Inc***., 338 NLRB 1002, 1003 (2003). The Board's rationale for limiting extrinsic or parol evidence is that the terms of the agreement must be clear from its face

so that employees and outside unions may look to it to determine the appropriate time to file a representation petition. ***Cooper Tire & Rubber Co***., 181 NLRB 509 (1970). If it is necessary to examine the parties "understanding" of the duration of a contract to determine its effective dates, the contract is not a bar. ***Shen-Valley Meat Packers, Inc.***, 261 NLRB 958, fn.1 (1982), citing ***Pacific Coast Association of Paper and Pulp Manufacturers***, 121 NLRB 990, 994 (1958). See also ***South Mountain Healthcare***, supra at 376, fn. 3, citing ***Jet-Pak Corp.***, 231 NLRB 552, 552-553 (1977).

The collective bargaining agreement in the instant matter appears to be a contract of eight years duration. The cover sheet of the contract reads "April 1, 2002 – June 30, 2010." The duration clause, Article 2, sets the terms thus: ". . . this Agreement becomes effective April 1, 2002 and shall continue in full force and effect until Midnight, March 31, 2010. . ." Directly below the duration clause the parties signed the agreement on June 17 and 18, 2007. "The Board has determined that when the execution date and the effective date of a contract differ, the effective date is controlling for contract bar purposes." ***May Department Stores Co.***, 129 NLRB 21, 21 (1960), citing ***Benjamin Franklin Paint and Varnish Company***, 124 NLRB 54 (1959). The petition was filed on July 30, 2008, ostensibly in the sixth year of an eight-year contract. The year 2007 is entered in Article 1, where the parties set forth the date the agreement is entered, but the month and day are left blank. At Article 21, General Wage provision, the first wage increase is "retro[active] to 6-01-06, Effective 06-01-07. . . Effective 06-01-08 . . . [and] Effective 06-01-09." There is nothing in the "four corners of the document" that unequivocally indicates that the contract is anything other than an eight-year contract, and the parties may not rely on extrinsic evidence to find otherwise. See ***Coca Cola Enterprises, Inc.***, 352 NLRB No. 123, slip op. at 2 (2008), citing ***South Mountain Healthcare***, supra. The Board has long held "where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred." ***Bob's Big Boy Family Restaurants***, 259 NLRB 153, 154 (1981), enf. denied 693 F.2d 904 (9th Cir. 1982). In the instant case, the Petitioner, relying on the effective dates set forth in the collective bargaining agreement, filed the petition in what it believed to be the sixth year of the agreement, at a time when the contract could not serve as a bar.[9]

Arguing three alternative theories, the Employer and Intervenor contend that the contract is a bar to the processing of the petition.[10] First, it is argued that the contract signed by the parties in 2007 with the erroneous 2002 start date bars the instant petition in

[9] The additional ambiguity with regard to the termination date of the contract, i.e., June 30, 2010 as set forth on the cover page, or March 31, 2010 as set forth in Article 27, does not affect the decision herein and is noted but not addressed.

[10] The Employer iterated these theories at hearing, but discussed and amplified only one in its post hearing brief. Thus, that theory, its reactivation or activation theory, is understood to be its primary basis for asserting contract bar. The Intervenor adopts the Employer's theories as enunciated at hearing.

that it is a "one-year old agreement" with an effective date retroactive to 2002. Secondly, it is argued that if the current agreement is a long-term agreement dating to 2002, contract bar was reactivated/activated in June 2007 when material changes to the existing terms and conditions of employment were agreed upon. Third, it is argued that the 2002-2010 contract should be viewed as a "one-year old agreement" and, due to an error in transcribing the document, erroneously indicates an effective start date of 2002 instead of 2007, and thus the contract bar rule should apply.

With respect to the first and third arguments, the Intervenor relies on ***General Cable Corporation,*** 139 NLRB 1123 (1962), wherein the Board adjusted the length of its contract-bar rule from two to three years. Id. at 1125. See, e.g., ***Madelaine Chocolate Novelties, Inc***., 333 NLRB 1312, 1312 (2001). ***General Cable*** is otherwise inapplicable. Moreover, both of these arguments implicitly rely on the execution date of the agreement to determine its duration, as does the second argument. As noted above, the Board has rejected application of the execution date in determining the duration of an agreement when it conflicts with the effective date. ***May Department Store,*** supra***; Benjamin Franklin Paint***, supra.

The parties' second argument, or reactivation/activation theory, is that even if the contract's effective dates were found to be from 2002-2010, the agreement was "reactivated" (or activated) based on the parties signing the contract in 2007. In order to reactivate a contract, there needs to be an extant contract to reactivate. There was not, as the record indicates that the 2004-2005 contract did not roll over. To "activate" a contract is to reach an agreement, and to execute it. The "activated" contract remains the same long-term agreement with conflicting execution and effective dates; an effective date commencing in 2002 and ending in 2010, a term well in excess of three years. "[W]here an employer and a union have created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition, such a situation does not stabilize labor relations." ***Bob's Big Boy*** at 154, fn, 8, citing ***Cabrillo Lanes***, 202 NLRB 921 (1973). Contrary to the Employer's argument in brief, a three-year contract cannot be established herein without resort to extrinsic evidence.

Finally, the Intervenor noted in its brief that in denying enforcement in ***Bob's Big Boy***, 693 F2d 904 (9th Cir. 1982), the court opined that the Board's holding of contract bar was an abuse of discretion. The Intervenor asserts that to find a contract bar in the instant matter would be a similar abuse of discretion. The contract bar doctrine is a balancing of statutory policies encouraging stabilized labor relations, and honoring and facilitating employees' exercise of their Section 7 right to be represented by the labor organization of their choice. The Employer and Intervenor have enjoyed a collective bargaining relationship in excess of 20 years. However, their new contract was for more than a three-year period and thus deprived of bar quality. I find that the policies of the Act are best served in this instance by finding no contract bar.

Conclusion

5. For the above stated reasons, and based upon the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time court security officers performing guard duties as defined in Section 9(b)(3) of the Act, employed by the Employer at the 36th District Court, 421 Madison Avenue, Detroit, Michigan, and excluding all other employees, office clerical employees and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 8th day of September 2008.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA), or MICHIGAN ASSOCIATION OF POLICE 911, or neither.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*** 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **September 15, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, **www.nlrb.gov**,[11] by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election

[11] To file the list electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.

that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **September 22, 2008**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlrb.gov**,[12] but may **not** be filed by facsimile.

[12] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.